that while in transit the old domicil remains. This was a question arising in reference to the right of taxation, and it was held that for such a purpose he was to be deemed an inhabitant of the original domicil, and was liable to taxation there. In a previous case, however, also in Maine, 15 Maine Rep. 58, *Exeter* vs. *Brighton*, the court took a distinction between home in respect to settlement, and domicil in its broadest sense, holding that the former ceased upon abandonment, although no new home was at once acquired. A. D.

RECENT AMERICAN DECISIONS.

In the Supreme Court of Indiana.

THE AMERICAN EXPRESS CO. *vs.* DUNLEVY AND OTHERS.

1. An express company contracted with the holder, in Indiana, to present a bill of exchange, drawn and indorsed by parties in that state, and accepted payable in New York. The bill was placed in the hands of a competent notary in New York a day before its maturity, and was, on that day, presented and protested, whereby the indorsers were discharged. On suit brought against the express company for their neglect, it was urged that the contract of the company was performed, when the bill was put into the notary's hands. This question examined, but not decided.
2. The express company, by delivering the bill to the notary on the day before its maturity, had made that officer their agent to hold and collect the paper. This employment had nothing to do with the notary's official character; it was not of necessity, but of the company's choice and for its convenience; it was attended with its risks, which must be borne by the party whose convenience is looked to in the employment. On this ground the express company is held liable.
3. The measure of damages is the face of the bill and interest.

The facts of the case are set forth in the opinion of the court, which was delivered by

PERKINS, J.—On the 25th of October 1857, Dunlevy, Haire & Co., of Indianapolis, Indiana, owned and possessed a bill of ex-

change, drawn by R. A. Douglas, indorsed by Blake and Van Blaricum, and accepted by P. A. Douglas, 309 Broadway, New York, for $5000. The last day of grace for payment of the bill was November 6th, 1857.

On the 25th of October 1857, the American Express Company received the above described bill from Dunlevy, Haire & Co., at Indianapolis, in the capacity of agents, to collect it for a reasonable compensation, and return the proceeds to the holder of the bill at Indianapolis. The Company took the bill to New York, and, on the 5th of November, placed it in the hands of a respectable notary for demand and protest. The notary demanded payment and protested the paper on that day, and no other demand was ever made. The demand and protest should have been made on the 6th of November. The Company never collected the bill; the indorsers, then solvent, were discharged by the carelessness of the notary. The drawer and acceptor are insolvent.

Dunlevy, Haire & Co. now sue the Express Company for the amount of the bill, and they recovered below.

The main question in the cause is, did the Express Company become liable to the holders for the amount of the bill on account of the failure to demand its payment on the proper day? We say this is the real question, because, if the Express Company became liable by that failure, we do not see that the delay of the holders to sue upon that liability, or their attempt to get their money on the bill from the endorsers, has extinguished that liability: See Ed. on Bills, 405. If the bill was not one requiring protest,—not one requiring the services of a notary, then, as all agree, the notary can be regarded as simply the agent of the Express Company, and that Company as liable for his negligence. The bill in question was drawn in one state, payable in another. The great weight of authority certainly is, that a foreign bill must be protested by a notary, if one be convenient, if not, then by persons present: 1 Par. on Notes and Bills, pp. 358, 633, and 642; 2 Id. 328; *Miltenberger* vs. *Spaulding*, 33 Mo. 421; *The State Bank* vs. *Hayes*, 3 Ind. 400. In those states, then, that hold a bill drawn in one

state of the Union on a person in another to be completely a foreign bill, it would follow that a notarial protest would, as the general rule, be required.

Taking it for granted, then, for the purposes of this case, that the bill before us is a foreign one, and required a notarial protest, and a notary having, in fact, been employed, is the Express Company liable for his negligence? Or did the liability of that Company cease when it delivered the bill, at the proper time, &c., to a competent notary, supposing the delivery was thus made in this case?

Upon this question the authorities are in conflict. One division of the authorities holds that a notary is a public officer, whom all may or must employ, and who is alone answerable for his own negligence to the injured party. But the New York authorities, and those in some other states, are different. Says Mr. Parsons, in his late work on Notes and Bills, Vol. I., p. 480: "The authorities are not uniform on this question; some hold the bank, or other agent, liable for the proper conduct of the notary employed; and those which hold the bank discharged by due care in selection of the notary seem to apply the same rule to any person selected with due care as a competent agent."

Chancellor KENT, in his Commentaries, Vol. 3, p. 94, of the 6th edition, and p. 128, of the 10th edition, in a note says: "In South Carolina the rule of law is in conformity with that declared in New York, and a bank who receives a note for collection, is liable for any neglect by which the indorsers are discharged. The use of the moneys collected is deemed a sufficient consideration for the undertaking. The bank (or other agent, the Express Company for example) must, therefore, see to the demand of payment of the maker, and to the giving of due notice of non-payment to the indorsers. If the note be placed in the hands of a notary, he is to be regarded as the agent of the bank, for whose neglect and mistakes the bank is liable: *Thompson* vs. *The Bank of South Carolina*, 3 Hill's S. C. Rep. 77." In *Hoard* vs. *Garner*, 3 Sandf. (N. Y.) Rep. 179, the New York doctrine is stated thus, by

Judge SANDFORD: "The principle established by *Allen* vs. *The Merchants' Bank*, 22 Wend. 215, was, that the implied contract of the banker was an undertaking to do the thing itself, and was not the delegation of an agent or authority to procure the thing to be done; that the contract looked mainly to the thing to be done, and his undertaking was for the due use of all proper means for its performance; that it was not a contract only for the immediate service of the agent and his acting faithfully as the representative of his principal. That in the latter case, the responsibility ceases with the limits of the personal service undertaken; in the other it extends to cover all the necessary and proper means for the accomplishment of the object, by whomsoever used or employed." For later New York cases, see 3 Selden 459; Edwards on Bills, pp. 112, 402, 403, and 476.

Ohio follows the line of these decisions: *Reeves, Stephens & Co.* vs. *The State Bank of Ohio*, 8 Ohio St. Rep. 465.

Indiana has followed the same line of decisions, as applicable to banks: *Tyson* vs. *The State Bank of Indiana*, 6 Blkfd. 225; and as applicable to attorneys: *Abbott and Others* vs. *Smith*, 4 Ind. 452. The question as to the applicability of the doctrine to a notary has not arisen in this state; nor do we think it now arises. The Express Company did not, in this case, deliver the bill to the notary at the proper time. We think the negligence in this case is chargeable to the Express Company. That Company did not limit themselves in the use of the notary to his official functions; and their own act, in prematurely placing the bill in his hands, tended to mislead him. If the Company had retained the bill till the hour of presentment for payment, then accompanied the notary to the place of demand, or, even if they had not accompanied him, a premature presentment would not have been made. See 4 Wharton (Penn.) Rep. 113; 18 Penn. St. Rep. 263; 21 Id. 506. On this point, we adopt the language of Judge RAY, who decided the case below.

It was clearly the duty of the Express Company to convey the bill to New York, and, at the proper time and place, to present the same and demand payment thereof. It was their duty to re-

tain the custody of said bill and control of the same. If payment was refused, they should cause the same to be duly protested and notice given. It cannot be insisted that because the acceptor might not pay the bill, therefore the Express Company were not required to present it and demand its payment. The acceptor might, and the presumption in such case is, that he will pay upon demand; and if without any demand the bill be given to a notary and he collects and retains the proceeds, the Express Company could not evade responsibility for the default of the officer. It would have been a case in which the employment of a sub-agent is not required. The notary is not, by virtue of his office, a collector; and if he were, the defendants are the collecting agents selected by the plaintiffs. If the notary, having possession of the bill the day before it was due, had negotiated the same, it is clear the defendants would have been liable. The bill was intrusted to their custody, and, unless there be a necessity for the transfer of that custody, it cannot be lawfully changed. Did that necessity exist? Certainly it did not at the time it was made, and it is not clear but that such delivery of the bill to the notary, the day before it became payable, followed as it was by a protest upon the same day, was the immediate cause of the default. But a review of the duties of a notary may furnish a still more satisfactory answer to the inquiry. The peculiar province of this officer is to furnish evidence. His certificate and seal are received as proof of the fact of the presentment of bills of exchange for acceptance or payment. He is not, either at common law or by statute, made the custodian of the paper, but simply the witness to attest and prove the act performed in his presence or under his eye. The bond he gives is but nominal, and the law does not require that papers of such value shall be placed in his absolute, uncontrolled charge. He is not like a sheriff, who is the custodian of the writ he executes, and who makes his return upon that writ. The one is an officer of the law having charge of the thing itself, with power to enter thereon his doings and retain the possession thereof and return the same into court. The other is but a witness to attest what is done, and perhaps by another,

in his presence, having no power over the paper presented and no legal right to its custody or control. It is convenient, doubtless, to transfer the possession of the paper to the notary, to hunt up the acceptor and make demand, but this convenience is accompanied by its risk, and the risk not being absolutely necessary, must be assumed by the party who voluntarily incurs it on account of its convenience.

It is said the recovery below was too large, interest having been allowed on the bill from maturity. Less than that sum would not have been recovered in a suit on the bill against the indorsers, had they not been discharged by the negligence of the Express Company. Says Edwards on Bills 405: "Where a bank with whom a note is deposited for collection fails to take the proper steps to charge the drawer or indorsers, in consequence of which the holder is unable to collect the amount of the bill, *the measure of damages is the face of the bill, with interest.*" See also Sedgwick on Dam., 353, citing *Walker* vs. *Smith*, 4 Dall. 389.

The judgment below is affirmed, with one per cent. damages and costs.

For the foregoing case, which discusses several interesting questions, we are indebted to the courtesy of J. D. Howland, Esq., of Indianapolis.

I. That the general law merchant requires a notarial protest of a foreign bill is not questioned: Story on Bills, § 277; Parsons on Notes, &c., 642; and the expression in the principal case, therefore, that "the great weight of authority" is so, is scarcely as strong as it might be.

II. It has been the subject of considerable doubt and discussion, whether or not a bill drawn in one state but payable in another, is to be considered as a foreign bill. Chancellor KENT, however, says the weight of authority is that it is foreign: 3 Kent's Com. 94 *n.*, and Justice STORY considers that it "is now well established:" Story on Bills of Exch., § 23, in which Mr. PARSONS coincides: 1 Parsons on Notes, &c., 642 *n.* This is also in analogy to the English doctrine, which holds a bill drawn in Ireland or Scotland on England a foreign bill: Chitty on Bills 10.

III. The most important point, however, that the principal case raises, is in regard to the liability of persons receiving bills on deposit for the acts of their agents or correspondents, and upon this point the decisions are very contradictory. The question has usually arisen between the depositors of the bills and banks, and in this aspect we shall consider it.

1. The leading case for the doctrine which exempts the bank from liability, is Bellemire *vs.* The Bank of United States, 1 Miles 173, decided by the District Court of Philadelphia in 1836,

and affirmed by the Supreme Court of Pennsylvania in 1839 (4 Wharton 105). The reasons assigned in the opinion of the former court by STROUD, J., are very clearly stated, and appear to cover the entire ground. The bank was held not liable, because the implied contract on the reception of a note on deposit, is to put it in the usual course of collection, and the *custom* of banks is to hand the note to a notary if not paid during banking hours. If the bank had employed its own agent or clerk it would have been liable for his negligence, because that would not have been the *customary* mode of collecting. And, in the Supreme Court, in affirming the judgment, GIBSON, C. J., added, that the custom of the bank being known, the depositor should have made a special contract if he desired any special measures taken. And in Mechanics' Bank *vs.* Earp, 4 Rawle 384, ROGERS, J., expressly and pointedly says: "the basis of the opinion of the court is, that the bank was an agent for the *transmission* of the bills," that being the contract implied by custom; and goes on to say, that if the jury on the second trial should find a special contract to *collect*, a different case will be presented. So in Wingate *vs.* Mechanics' Bank, 10 Barr 104, the bank was held liable on the ground that the jury had found the contract to be express for the *collection* of the note.

These decisions have been followed, though not always upon grounds as clearly stated, or as tenable, in the following states: Connecticut, East Haddam Bank *vs.* Scovil, 12 Conn. 303, where HUNTINGTON, J., argues, that it was necessary the bill should be presented at another place, and this must have been known to the depositor, and, therefore, the implied contract on the part of the bank was only to transmit: S. P. also Lawrence *vs.* Stonington Bank, 6 Conn. 521; Massachusetts, Fabens *vs.* Mercantile Bank, 23 Pick. 330, Dorchester, &c. Bank *vs.* New England Bank, 1 Cush. 177, and Warren Bank *vs.* Suffolk Bank, 10 Id. 582; Maryland, Jackson *vs.* Union Bank, 6 Harr. & Johns. 146, which, however, was a case of a person, not a banker, undertaking to collect a bill as an accommodation for a customer, and sending it to a bank for that purpose, and was decided on the general ground that the agent used ordinary care and diligence: Citizens' Bank *vs.* Howell *et al.*, 8 Md. 530; Mississippi, Tiernan *et al. vs.* Commercial Bank, 7 How. Miss. Rep. 648; Agricultural Bank *vs.* Commercial Bank, 7 Sm. & M. 592; Bowling *vs.* Arthur, 34 Miss. 41; Louisiana, Hyde *et al. vs.* Planters' Bank, 17 La. 560; Baldwin *vs.* Bank of Louisiana, 1 La. Ann. 13; and the point was mentioned in the Supreme Court of the United States, in Bank of Washington *vs.* Triplett *et al.*, 1 Pet. 25, but not decided, as it seems to have been conceded in that case, that the bank received the note expressly for *transmission* only.

2. On the other hand, in some states the bank is held liable for all the acts and omissions of the other bank, notary, or other agent to whom it delivers the note. The question arose in the Supreme Court of New York, 1836, Allen *vs.* Merchants' Bank, 15 Wendell 482, and was there decided in accordance with the doctrine already enunciated in Bellemire *vs.* Bank of United States. But in the same case in 1839, 22 Wendell 215, the Court of Appeals reversed the decision of the Supreme Court by a vote of fourteen senators against the chancellor and nine senators, who were in favor of affirmance. This case, though decided by

so divided a court, is the leading case on this side of the question, and not only settled the law of New York, but has been approved and followed in other states. The argument of VERPLANCK, Sen., which may be considered the opinion of the court, endeavors to show that the case does not differ from the ordinary ones, in which the maxim *respondeat superior* applies, and that there is no real difference between receiving a bill for collection in the same place and in a distant place. It had already been decided in McKinster *vs.* Bank of Utica, 9 Wend. 46, s. c. in Court of Appeals, 11 Id. 473, that the bank is responsible where the jury had found that it received the note for collection, and the real point decided in Allen *vs.* Merchants' Bank, is, that the implied contract of a bank receiving a note payable in a distant place is to *collect*, and, therefore, that it is responsible for all the acts of its agents or correspondents. This is the only real difference between the decisions in Pennsylvania and New York, and the states which follow them respectively.

In Bank of Orleans *vs.* Smith, 3 Hill N. Y. 560, the Supreme Court, yielding as little as possible of its former opinion, explained Allen *vs.* Merchants' Bank, and held, that both the transmitting and the collecting banks were agents of the depositor of the note, and, therefore, liable to him; but the Court of Appeals disapproved this case, and held in Montgomery Co. Bank *vs.* Albany City Bank, 3 Selden 459 (reversing s. c. 8 Barbour 396), that the second bank, or individual employed to collect, is the agent only of the first bank, and responsible solely to it. And in Commercial Bank *vs.* Union Bank, 1 Kern. 203 (1854), ALLEN, J., says the liability of the first or receiving bank "is no longer an open question."

Similar decisions have been made in South Carolina, Thompson *vs.* Bank of the State, 3 Hill S. C. 77; Ohio, Reeves *et al. vs.* State Bank, 8 Ohio State Rep. 465, and this would appear to be the law in Indiana, Tyson *vs.* State Bank, 6 Blackf. 225, Abbott *et al. vs.* Smith, 4 Ind. 452; though the question does not seem to have arisen in the case of a bank sending a bill to a distant place for collection. The law in England also appears to have been settled in the same way: Van Wart *vs.* Woolley *et al.*, 3 Barn. & Cress. 439 (10 E. C. L. R. 204); Mackersy *vs.* Ramsays *et al.*, 9 Cl. & Finn. 818.

3. In some of the earlier cases the question was raised, whether there is any consideration on account of which the bank can be held liable, but in Smedes *vs.* Utica Bank, 20 Johns. 372, it was held that the use of the money, as a deposit from the time of payment of the note till the depositor draws it out, is a sufficient consideration, and this view has been generally followed.

4. Much endeavor has been made to establish a distinction between the cases of bills payable where the bank is, and those payable in a distant place, but there does not appear to be any foundation in principle for such distinction, and the fact is only important as evidence of the implied contract.

5. The question has not often arisen between parties other than banks and depositors, but the increasing amount of such business done by other persons, especially express companies, is likely to raise important questions as to how far the principles applied to banks may be modified by contact with different rights, obligations, and customs.

6. As the result of the foregoing examination, it may be stated that the question narrows itself down to one of implied contract, whether by the recep-

tion of a bill on deposit, the bank undertakes to *collect*, and thus becomes liable for the acts of those by whom it performs the collection, or the undertaking is only to *put the bill in the ordinary course of collection*, in which case the bank is responsible only for want of due care in the selection of such sub-agents as are customarily employed in such business.

IV. It follows necessarily from the doctrine which exempts the transmitting bank from responsibility, except for its own want of care or good faith, that the bank, notary, or person to whom the bill is sent, becomes the agent of the holder and responsible directly to him; but some important questions have arisen in cases where the second bank has considered and treated the remitting bank as the owner of the bill, as to the right of the second bank against the owner to retain the proceeds in satisfaction of debts due by the remitting bank. The decisions may be stated as establishing, that if the collecting bank *bonâ fide* considers the remitting bank as the owner, and *actually* makes advances, or allows balances to remain, or does some similar act *on the faith of the receipts* or anticipated receipts from the bill, it will be entitled to retain the proceeds even against the real owner of the bill. But both the belief and the act must concur—neither by itself will give any title: Bank of Metropolis *vs.* New England Bank, 6 How. U. S. Rep. 212; Jones *et al. vs.* Milliken *et al.*, 5 Wright (41 Penn. State) 252; McBride *vs.* Farmers' Bank, 25 Barbour 657; Reeves *et al. vs.* State Bank, 8 Ohio State Rep. 465.

V. The cases so far have been discussed as questions of implied contract and of agency, but they do not all rest clearly and squarely upon that ground. In some of them the reasons of the decision are not very apparent, and in not a few, the position is more or less definitely assumed, that a bank is not liable for the negligence of a *notary* employed by it.

This question is discussed though not decided by the principal case. Accurately stated the question is, whether a notary is a public officer in such a sense as will exonerate a party employing him from liability for his negligence, in a case where the principal would certainly be liable, if the person he employed were not a notary.

We do not find any case in which this point has been fairly met and decided, but we say this is the real question, because if the decision is upon a custom, then it would be the same if custom had pointed out any other person as the proper one to be employed, and if it be upon the ground, as it is in some cases, that a notary is *primâ facie* a proper person for a careful agent to select for certain business, then the only difference in employing another person, would be the burden of proof that he was a competent and proper person for the work. Certain officers, such as the mail carriers, the sheriff, &c., are public in such sense, that a person employing them in a case within their functions is released immediately from all further liability, which is transferred directly to the officer. Is a notary such public officer?

In Allen *vs.* Merchants' Bank, 22 Wendell 215, VERPLANCK, Sen., discusses this question, and intimates his doubt whether the bank would be liable, if the negligence was in the performance of a duty strictly official, which could only be performed by some notary, but then proceeds to show that the point did not necessarily arise in that case. And in Smedes *vs.* Bank of Utica, 20 Johns. 372, there is a dictum of WOOD-

WORTH, J., that "if the note had been delivered to a notary it would present a different case. Notaries are officers appointed by the state; confidence is placed in them by the government;" but he proceeds to show, that this would be evidence to justify an agent in selecting them for certain business, and the reasoning would seem to apply to any agent selected with due care.

In Hyde *vs.* Planters' Bank, 17 La. 560, some stress is laid on the fact that the notary is an independent sworn officer, and in Baldwin *vs.* Bank of Louisiana, 1 La. Ann. 13, it is said, that the notary is a public officer, "whose official character implies a certain degree of skill and experience," but the decision is expressly rested on the implied authority to employ a sub-agent, citing Story on Agency, § 201.

In Governor, to use, &c. *vs.* Gordon, 15 Ala. 72, the question was upon a statute of Alabama, that no action "shall be maintained against the sureties of any sheriff, constable, or *other public officer of this state*," &c., unless commenced within six years. The action was against the sureties of a notary, and the court held that the notary was a "public officer," within the statute. See also Citizens' Bank *vs.* Howell *et al.*, 8 Md. 530.

From these, which are the principal cases on the subject, it appears, that the point as stated above has never been decided in this country, and has not even been fairly stated except by VERPLANCK, Sen., in Allen *vs.* Merchants' Bank. That able and profound jurist intimates his opinion, that the notary alone is responsible for such acts as are strictly official. This was *obiter dictum*, however, and does not appear to be necessarily in conflict with the opinion of STROUD, J., in Bellemire *vs.* Bank of United States, 1 Miles 173, where the ground intimated in Smedes *vs.* Utica Bank, that the bank was not liable because the notary is a public officer, is strongly disapproved. The point, therefore, appears to be still open, and is probably not likely to arise often, as the custom of banks to employ notaries is universal, and this custom with its implied authority to employ a sub-agent, is becoming generally recognised as the ruling fact in controversies of this kind.

VI. The last question discussed in the case in hand, is the measure of damages; in which the court undoubtedly adopted the true rule. The delay in suing the company, and the attempt to get the money from the indorsers, had, as remarked by the court, nothing to do with the responsibility of the express company to the plaintiffs. It has, however, been decided, that the company is not liable for the costs of an action against the indorsers, the plaintiff having had an immediate right of action against the company: Downer *vs.* Madison Co. Bank, 6 Hill, N. Y. 648. J. T. M.